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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Federal Communications Commission  
Office of the Secretary Washington, D.C. 20554

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FCC MAIL BRANCH

In the Matter of

CC Docket No. 92-90

The Telephone Consumer Privacy  
Act of 1991

COMMENTS OF THE PACESETTER CORPORATION

The Pacesetter Corporation, a Nebraska corporation, in accordance with the Notice of Proposed Rulemaking in the above-captioned matter, hereby responds and comments upon the issues addressed therein.

BACKGROUND

The Pacesetter Corporation is a privately held corporation which has been in existence since 1964. It is recognized by Qualified Remodeler as the largest home improvement contractor in the nation, having operations in thirty-five states. Pacesetter's corporate headquarters is located in Omaha, Nebraska as is its manufacturing plant, where it manufactures custom made window and door products.

Pacesetter is a direct-sales company. Having no retail stores it conducts all sales through in-home solicitations to residential consumers. It relies upon an internal telemarketing department to arrange specific appointments for Pacesetter sales representatives with prospective customers. After a sale occurs, Pacesetter proceeds to custom manufacture the customer's windows and/or doors,

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and it utilizes employees to ship and install those products. Pacesetter customers can also purchase siding and cabinet products which are manufactured for Pacesetter.

Pacesetter has over fifty sales offices nationwide, and its telemarketing activities are conducted in twenty regional offices employing more than four hundred full-time telemarketing representatives known as communicators. In 1991 Pacesetter's telemarketing payroll exceeded \$9.5 million.

Many of Pacesetter's customers reside in rural areas where the selection of home improvement products and contractors is limited. By means of its direct-sales activities Pacesetter is able to provide quality products and services which may not be readily available on a local basis. Pacesetter is able to reach these consumers through its telemarketing operations which allow the company to work large areas around each Pacesetter office.

Although Pacesetter has a high percentage of repeat customers, it is continuously developing new market areas. This involves a large volume of "fresh" outbound telemarketing calls. Pacesetter communicators complete over 60,000 telephone calls per workday.

Telemarketing has been a foundation of Pacesetter's business since its inception. As a responsible company Pacesetter has long maintained an internal "do not call" list. The company has endorsed and adopted the "Guidelines for Marketing by Telephone" promulgated by the Direct Marketing Association (DMA). It seeks to be responsive to all customer complaints and is a member of scores of Better Business Bureaus throughout the country. Pacesetter is

also a member in good standing of both the DMA and the American Telemarketing Association.

THE NOTICE OF PROPOSED RULEMAKING  
AND ITS RELATION TO PACESETTER

The Notice invites comments on the need for and substance of regulations in a number of areas. Pacesetter's comments are limited to the tentative proposals relating to telephone solicitations to residential subscribers.

Telephone Solicitations to Residential Subscribers.

**1. What telephone solicitations are objectionable?**

The Telephone Consumer Protection Act of 1991 (TCPA) directs the Federal Communications Commission (FCC) to initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. (Emphasis supplied) This task would seem in many ways to be nearly an impossible one, because the FCC must first determine what are "telephone solicitations to which they (telephone subscribers) object". Does this directive address telephone solicitations to which all subscribers object? A majority of subscribers? A few subscribers who vehemently voice objection? Furthermore, how is the FCC to devise a screening mechanism which would permit unobjectionable calls while prohibiting those calls that are not acceptable to the telephone subscriber?

In today's world a telephone subscriber may expect to receive

telephone solicitations from a wide variety of sources. Many of the largest companies in the country routinely employ telemarketing to reach customers and prospective customers. More and more smaller businesses are also utilizing this swift and personal type of direct marketing. While one subscriber may object to a telephone solicitation from a book publisher or home improvement company, the same individual may actually welcome a solicitation from a new dentist who has recently established a practice near the subscriber's home. Pacesetter submits that unless and until a regulatory system can be devised which would take in to account the multitude of differences among types of solicitors as well as types of subscribers, any system would necessarily be unacceptably arbitrary.<sup>1</sup> In addition any system of categorizing solicitors would undoubtedly become so complex as to be almost totally unworkable under the present state of technology.

The attitudes and sensitivities of consumers (subscribers) are in a constant state of flux. A consumer who has absolutely no interest in insurance products and services today may have a profound interest next year. While an insurance solicitation today may be objectionable, next year that same solicitation would be highly desirable. How can any regulatory scheme possibly keep pace with these vicissitudes? While it may be possible to obtain some

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<sup>1</sup> A system which distinguishes between live operator calls and prerecorded messages may not be arbitrary. Pacesetter's communications system uses only live operators. Pacesetter notes paragraph 24 of the Notice indicating that only approximately 10% of unsolicited telephone call complaints related to calls from live operators.

consensus on certain means of presentations that are deemed to be objectionable, such as voice recorded messages, it would be inappropriate, capricious and probably unconstitutional to attempt to prohibit or regulate the content of the message itself.

The TCPA also provides certain exceptions from its definition of telephone solicitations, namely calls:

"(A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization."

These exceptions would prove to be troublesome in any regulatory system. Undoubtedly many subscribers would dispute the premise that these exempt calls are not objectionable. Indeed many subscribers may find these calls to be highly objectionable which would undermine the integrity of the entire regulatory system.

One must question the factual basis for these exemptions. Can we rationally presuppose that a former dissatisfied customer of a particular business would not object to a telemarketing call from that business but would object to receiving information about a new enterprise which may have a very desirable product to offer that subscriber? Are not a majority of subscribers weary from the monthly calls from various civic benevolent organizations? If the purpose of the TCPA is to regulate nuisance calls, a more thoughtful categorization is essential.

**2. Is regulation of telephone solicitation constitutional?**

The First Amendment clearly protects the commercial speech contained in a telemarketing message. While courts have recognized a somewhat nebulous Constitutional right to privacy, an acceptable line of demarcation between these sometimes competing rights has not been clearly defined. Under the TCPA the FCC has been asked to draw such a line by regulation.

There is a critically important distinction to be made at the outset when examining this process of balancing Constitutional rights. Assuming an unrestricted freedom of action of by individual in his own home, that person may reject, disregard or turn away from any commercial speech encountered there. He may throw away the mail, turn off the television or radio, slam the door on the door to door salesman, cancel the newspaper subscription, or hang up the telephone. The individual has unlimited freedom of choice in the home to block out any undesired message.

The government on the other hand does not have unlimited power to block or regulate commercial speech. Before the government can act to restrict free expression, there must exist a legitimate governmental interest of sufficient magnitude as to warrant limits being placed on this basic First Amendment right. Next, the remedy or regulation limiting free speech must be narrowly concentrated so as to not restrict speech beyond the public's need for protection.

**3. Telemarketing calls are not so intrusive as to justify a broad governmental prohibition.**

The TCPA does not target inherently harmful telephone communications. It is not directed toward abating telemarketing fraud. Nor is its purpose to prohibit extortion or intentional harassment. Instead its purpose is to curb a form of heretofore lawful advertising and to inhibit the means by which thousands of legitimate businesses offer their goods and/or services to consumers.

The governmental interest in preserving and protecting a citizen's right to privacy in the home is the foundation for the TCPA. This right to privacy does not and should not include the right to have the government shut out all commercial advertising which the individual may find inconvenient. If the privacy interest is that paramount, the government should also be permitted to prevent businesses from disseminating unpopular messages on television, over radio or in newspapers. It would be dangerous indeed to sanction such broad controls on commercial free speech, when the only perceived harm is annoyance or inconvenience.

It is not manifestly apparent that even a significant minority of persons consider telemarketing calls to be a serious annoyance or inconvenience. On the contrary millions of Americans are well served by information received through telemarketing messages. The Supreme Court has recognized that the dissemination of commercial information through advertising is an important First Amendment guarantee which benefits the public.

"As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate....Even an individual advertisement, though

entirely "commercial", may be of general public interest....No line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information." (Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, (1976) at p.762)

To suggest that the convenience of a telephone subscriber justifies the imposition of what may amount to a broad ban on telemarketing, cannot be supported by existing Constitutional law. In Martin v. Struthers, 319 U.S. 141 (1943) the Supreme Court struck down an ordinance which prohibited salesmen from entering the porch and ringing the doorbell of a residence without obtaining prior consent. Answering a telephone is certainly no greater inconvenience than answering the doorbell, particularly when there is a live solicitor at the door or a live operator on the telephone. Pacesetter firmly believes that there does not exist a compelling governmental interest in preserving and protecting the individual's right to convenience and uninterrupted which would outweigh the freedom of speech protections afforded by the Constitution.

**4. Comprehensive regulation and restrictions upon commercial telemarketing would be unconstitutional.**

Since the TCPA is intended to prohibit telemarketing calls which subscribers find annoying and inconvenient, any FCC regulations thereunder must be sufficiently broad in scope so as to effectively ban all annoying calls but narrowly designed so as not to prevent unobjectionable messages from reaching subscribers.

Unfortunately the TCPA has a constitutionally fatal flaw in



its conception. By exempting all charitable calls and all calls originated by a business with whom the subscriber has a prior relationship, the Act has arbitrarily classified some patently annoying calls as unobjectionable. The Equal Protection provisions of the Constitution forbid such arbitrary distinctions.

It is difficult to conceive of a national regulatory scheme which would filter out objectionable calls to the subscriber without at the same time catching in its immense net some telemarketing messages which the subscriber would wish to receive. It has been suggested that a national database would effectively permit a subscriber to exclude all unwanted telemarketing calls. But any database listing which would exclude all commercial calls would obviously fail to take in to account those calls which the subscriber may under certain circumstances deem to be desirable. Some have suggested that telemarketers be classified into several groups, so a subscriber could elect for example to exclude calls from businesses attempting to sell insurance products or those offering financial services. In addition to the incredibly cumbersome methodology involved in establishing such a system, it is a certainty that some telemarketing operations would have various unique features resulting in their misclassification or even multiple classification.

Once the FCC or any governmental agency participates in the formation or implementation of any program which systematically prohibits one or more types of telemarketing calls on behalf of any class of subscribers, such as those who might participate in a

national database, the government has become involved in the suppression of speech and is not merely enforcing the individual choices of the subscriber.

In reality the only type of system which can account for the distinctive characteristics found in each business utilizing telemarketing and at the same time recognize the unique needs and wants of consumers is one in which each subscriber may choose to accept or reject each caller at that particular moment. That is precisely the system that exists today without any governmental regulation.

**5. Pre-emption of conflicting is desirable.**

If the FCC determines that some form of limited regulation of live solicitation calls is constitutional and necessary, one goal of such regulation should be the preemption of conflicting state laws affecting interstate telemarketing. Inasmuch as two competing federal constitutional rights are involved in the scope of the TCPA, the states should not be permitted to adopt a patchwork of conflicting and overlapping regulatory systems.

**6. What are the regulatory alternatives?**

Even if regulation of telephone solicitation is legally enforceable, the best means to be used in accomplishing this function is a subject of considerable difference of opinion. The Notice invites comment on several alternative methods for preventing invasion of the subscribers' rights to privacy.

a. Databases. One proposal would involve the creation of a nationwide database containing the names of persons who do not wish

to receive telephone solicitations. Pacesetter submits that not only is this proposal impractical, but it would create an onerous economic burden on commerce in general and the telemarketing industry in particular.

Pacesetter, like many outbound telemarketing companies, relies primarily on local telephone directories to obtain the names and phone numbers of its telemarketing prospects. The cost of these directories is minimal. Various pages can be distributed to the communicators who can systematically proceed to call names on that list. The directories are updated annually and are therefore relatively current.

In some areas, notably the State of Florida, the use of telephone directories is not possible. In such cases Pacesetter must purchase an edited list from a "list preparer" who collates the local phone directory list with the state's "do not call" list. At present Pacesetter's cost for this collated list for Florida is \$20.00 per 1,000 names. Based upon the number of calls made each year by Pacesetter, it is estimated that a collated national list would increase Pacesetter's per call cost for phone number identification by a staggering 1,195%.

The Florida statute creates a very rudimentary "no call list" system. The Florida list contains no categorization as to types of telephone solicitations which the subscriber will or will not accept. It contains numerous arbitrary exemptions. For the reasons stated above, Pacesetter has very strong objections to this type of blanket prohibition in the Florida model, and the thought

of this type of system being implemented on a national level has a chilling effect on virtually all outbound telemarketing companies.

It is inconceivable that a national database would meet subscriber expectations. Not only would subscribers on the national list continue to receive "exempted" calls as noted above, but the task of adding, deleting and amending entries on the list would undoubtedly be monumental. Any national list which could not be updated at least quarter-annually would additionally fail to meet subscriber expectations and desires.

Nationwide telemarketing companies such as Pacesetter would be extremely hard hit by the cost of a national database system. Such companies may find it necessary to purchase names and phone numbers for substantially all area codes in the country. Furthermore this cost would be incurred several times each year. In order to prepare its own collated list, the company could incur the substantial expense of becoming fully automated with each communicator utilizing a computer network system. It is estimated that the cost of becoming fully automated would be \$8,000-10,000 per phone station. The economic impact of integrated computer networking on a nationwide telemarketer such as Pacesetter would be onerous. Another alternative would be to simply concentrate the calling areas to a few area codes at a time so as to reduce the size and therefore the expense of the purchased list each quarter. This approach would dictate that Pacesetter close some telemarketing offices in order to centralize telemarketing

operations or offer seasonal employment only during those times of the year when local area codes are being called. Naturally, this approach assumes that a telemarketing company could choose to buy a regional or local list of names and numbers. On the other hand, if the national database did not break down lists into particular area codes or geographic locations, a small telemarketer which initiates only calls to one city or area code would be required to buy millions of edited names and phone numbers across the nation, most of which would be totally valueless to his operations.

Subscribers would indirectly assume much of the cost of a national database through an increase in prices. Some of the expense would be nontransferable resulting in the extinction of many smaller telemarketing companies. And the costs of this system would be sizeable indeed. Besides the general operating costs for labor and equipment, certain other factors must be considered as well. For example, to be truly effective, the existence of this proposed system must be communicated to subscribers, an "advertising" cost. This cost must either be transferred to the phone companies and then on to subscribers, or sustained with public funds to support public service announcements, or the cost may be levied as an additional financial burden on the telemarketing industry itself. In any case the overall cost of a national database system would have a stifling economic effect on the telemarketing industry which would in turn have a ripple effect on the nation's economy.

In short the establishment of a government contractor to

provide the necessary services to meet this task would result in an inefficient, quasi-governmental, monopolistic monster.

One must look very hard to find any economic benefits to be derived from a national database. By their very nature telemarketing calls to residential subscribers do not result in any loss of income producing time to the subscriber. In order to measure the economic benefit to a subscriber one must somehow place a value on a few seconds or minutes of his/her so called "privacy rights". The TCPA is afterall designed to protect privacy rights, not to prevent telemarketing fraud or avoid other types of direct costs that may be incurred by subscribers as a result of telemarketing abuse. Other laws exist to address those concerns. On the basis of a cost/benefits analysis a national database is clearly insupportable.

b. Network technologies.

Others in the technical services segment of the industry can best address the technological capabilities existing to block or screen telemarketing calls. Pacesetter's experience shows that telephone subscribers are served not only by the giant interstate long-distance carriers but also ultimately by hundreds of local phone companies. Even if telemarketing companies can develop sophisticated switching and identification devices, the local phone company must have compatible equipment capabilities which would permit its subscribers to take advantage of these technologies. Many do not.

Although caller identification technology exists, presumably

any system which would require residential subscribers to purchase equipment having this capability would not be an acceptable economic burden to place on consumers. Likewise, imposing this expense on the industry would be cost prohibitive.

c. Industry-based or Company Specific Do Not Call Lists.

Virtually all reputable telemarketing companies maintain internal do not call lists. Many companies, like Pacesetter, also utilize the DMA's Telephone Preference Service which consists of a nationwide listing of persons who have indicated a desire to not receive any telemarketing calls. There are many sound business reasons for a company to refrain from calling individuals who have expressed an aversion to telemarketing calls. Perhaps foremost is the knowledge that calls to such persons will be nonproductive and result in aggravation to both the subscriber and the caller.

Unfortunately, do not call lists are prepared by imperfect people. People forget; they make mistakes in recording information; and they lose information. A rigidly enforced regulation mandating a company-based do not call list may in some circumstances be too harsh. While the concept would seem to be beneficial to both subscribers and telemarketing companies, punishment for violations should be limited to cases of wilful neglect or intentional disregard of the subscriber's wishes.

In Pacesetter's experience a written confirmation to the subscriber that his/her name has been placed on the do not call list not only acts as an assurance to the subscriber, but it also reinforces the prohibition in the minds of the telemarketing

representatives. The most effective system would not however place the sole responsibility for the listing on the telemarketer. If the subscriber has at his/her disposal a readily available means of communicating the request to the company, improved compliance is likely. The subscriber should be given the option of requiring written confirmation of his/her request to be placed on the do not call list or, if confirmation is not forthcoming, then to verify the request by a writing addressed to the telemarketing company.

d. Special Directory Markings.

At least one state, Florida, has experimented with a so called "asterisk" law. Neither subscribers nor telemarketers appear to have been satisfied with the results of that experiment as suggested by the fact that the plan has been abandoned in favor of a state-wide "no call" list. Part of the dissatisfaction may have been due to the "black or white" nature of a do not call listing under which the subscriber either elects to ban all telemarketing calls or is considered to be agreeable to all calls.

While an asterisk type listing system is less costly to telemarketers who utilize phone books than is an agency listing service, it presupposes that the subscriber has no interest in any goods or services offered by telemarketing, which is simply not universally true. The subscriber who chooses to be footnoted in the phone book as not accepting telemarketing calls is in most instances indicating that he would prefer to forego all welcome and beneficial calls rather than receive a few objectionable ones. It is an unfortunate choice, and only a very small number of Florida



residents were willing to make it.

#### **5. Time of Day Restrictions.**

The Notice invites comment on the need for restrictions on the hours when telemarketing calls could be made to residential subscribers. Telemarketing companies already exercise self-regulation in the area of calling hours for obvious reasons. Subscribers are not receptive to commercial phone messages at odd hours of the day or night, rendering such calls unproductive and in all likelihood destroying the potential interest of the subscriber in the telemarketer's message at any future date. For these reasons it is not likely that this subject is the basis for a substantial number of consumer complaints.

There are, however, certain identifiable groups who prefer calls at hours most subscribers would consider unacceptable. For example, many farmers prefer calls early in the morning before their business day begins. Restrictions on calling hours should not therefore be the subject of governmental regulation but instead left to the marketplace which can best set appropriate hours.

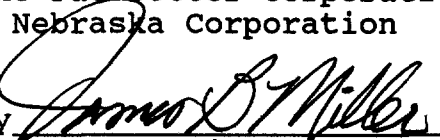
#### **CONCLUSION**

Live telemarketing solicitations are simply not a source of widespread complaint among residential telephone subscribers. The idea of prohibiting virtually all telephone marketing through a governmentally controlled system of classification is fundamentally repugnant to the First Amendment guarantee of commercial free speech. Our open market system operates well in regulating the

flow of commercial advertising. Consumers will continue to welcome telephone solicitations which are well-prepared and offer an important message, and consumers will relegate to oblivion those messages which are considered an annoyance.

The Pacesetter Corporation,  
A Nebraska Corporation

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